

# E-PROCEEDINGS

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## **THE EFFECTIVENESS OF *SULH* ON MATRIMONIAL ASSET DIVISION AFTER DEATH OF SPOUSE**

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## **ABSTRACT**

Distribution of matrimonial asset to deceased's spouse often faced with obstacles and took longer time to be settled. This is due to the current provision relating to division of matrimonial asset emphasized on the parties' contribution to determine the appropriate proportion to the deceased's spouse. Lack of evidence especially in proving the contribution of parties has caused difficulties for courts to reach decision. This study is aimed to examine the effectiveness of *sulh* with regards the distribution of matrimonial asset upon the death of spouse. The study uses qualitative method by collecting information from unreported cases within the period of 2000-2012 from six zones representing Syariah Courts in Malaysia. Analysis is made based on several variables such as types of matrimonial property, factors for consideration and proportion of distribution of the assets. The findings show that *sulh* was an effective method to resolve issues relating to the contribution of parties in division of matrimonial asset due to death of spouse. The findings also discovered that exclusive ownership of matrimonial asset especially matrimonial home to the deceased's wife could provide adequate security and protection for her survival after the death of husband. Therefore, this study suggests that the use of *sulh* as a mode of dividing the matrimonial asset is to be widely practiced when dealing with the division of matrimonial assets to prevent a costly and lengthy litigation process. Perhaps this is the first study to focus on *sulh* methods involving distribution of matrimonial asset to spouses after the death of their husband or wife.

**Keywords:** Matrimonial Asset, Malaysian, *Sulh*, Syariah Courts, Spouse's death

## **1. INTRODUCTION**

The division of matrimonial asset of deceased husband or wife is frequently litigated in the Malaysian Syariah Court. Longer litigation procedures and complicated issue arises out of the evidential process highlights the significant problems faced by the courts in handling the case involving division of matrimonial property upon death of spouse. Thus the mutual agreement between the parties is an eminent method to deal with the division of matrimonial asset that could encourage shorter litigation process and fair distribution among the parties. Matrimonial asset or commonly known as *harta sepencarian* is defined as property jointly acquired by husband and wife during their subsistence of marriage according to *hukum syarak*. Though, there is no specific provision regulates the division of matrimonial property upon death, the previous case law highlights that the court is subjected to the law of division as embodied in section 122 of Islamic Family law Enactments. The law requires the court when dividing the matrimonial property to consider several factors including contribution of parties in acquisition of the asset, interest of minor children and debt of spouse in acquiring the asset. However, the provision relating to distribution of matrimonial assets in Malaysian Syariah Courts is not practical and do not complement the actual mode of division of assets which solely bases on the contribution of parties. The provision should focus on distributing the asset on a fair and equitable basis and should address holistic needs of all parties involved. Thus, this study is expected to fill in the gap and the finding of this study may act as suggestion for the solution to the problems related to the division of matrimonial property especially on the effective methods to be used in managing the dispute in division of matrimonial assets. Thus, this paper is eminent to identify the method used in solving the dispute and hence, examines the effectiveness of the law through the court practice. It also highlights the use of *sulh* as an effective method in determining the proportion of share of matrimonial assets after spouse's death. The study is significant as it is not yet being studied by

other researcher when the focus is made on way the assessment is made in dividing the asset especially when involving the division of asset upon death of spouse.

## **2. THE LAW OF DIVISION OF MATRIMONIAL ASSET UPON DEATH OF SPOUSE**

A large literature now exists examining the concept of *harta sepencarian* on the origin and the interpretation as well as the impact of the principles of law in the practice of division. This implies that the custom of division of *harta sepencarian*, among Malay gives significant impact to the form of the law in the enactments. The conceptual researchers examining originality of the customs of division of matrimonial asset in Malay society implying that basically, there was very few research conducted on this matter except the general study on the provision as regards to the division of matrimonial asset after divorce.(Norlia, 2004).

Though there is no specific provision regulates the law on division of matrimonial property upon death of spouse, the case law highlights that the division has been practiced in Malaysian shariah court. The wife or husband of deceased has rights to the division of *harta sepencarian* and the practice has been recognized for years since the independent time. However, the development of the law is settled after the recent fatwa issued by state of Selangor which allows matrimonial property to be distributed prior to the distribution of the deceased estate to heir according to *faraid* rules. This practice was applicable throughout states in Malaysia which indicates the well improvement of law and to safeguard the interest of deceased spouse as well as their children as regards to the matrimonial asset. The extension of the law empowers the court to order the division of *harta sepencarian* upon death of husband or wife by invoking similar law as embodied in section 122 of Islamic Family Law Enactments. The law requires the party to prove the asset as *harta sepencarian* and in dividing the asset the court is required to consider the need of wife and minor children. The above provision clearly embodied the rules to the court to order the division of matrimonial assets acquired during marriage upon granting a pronouncement of *talaq*. The section particularly highlights two subsections. Firstly, subsection (1) where the court orders the division between the parties of any assets acquired by them during their marriage by their joint efforts and secondly, subsection (3) where the courts order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage. For division of the first category the court shall incline towards equality of division. The division, however, is subject to certain factors which the court has to take into account such as the extent of the contribution made by each party in the form of money, property or work towards acquiring the assets. Besides, any debts owing by either party which were contracted for their joint benefit will also be considered. The needs of minor children, if any of the marriage will not be ignored too.

As regards to the second category of assets or assets acquired by the sole effort of one party to the marriage, the court may divide the assets in proportion as it deems reasonable, subject to certain factors. Besides the extent of contribution made by those who did not acquire the assets to the welfare of the family by looking after the home or caring the family, the court will also consider the need of minor children from the marriage, if any. In any case the party by whose effort was acquired the asset shall receive a greater proportion.

Subsection (5) is the extension to the scope of *harta sepencarian* to include asset acquired before the marriage by one party where the asset must be substantially improved during the marriage by the other party or by their joint effort. Furthermore, section 122 describes the term assets as assets of joint and sole effort. The statutory and judicial definition of *harta sepencarian* has made clear on the concept of matrimonial assets as practiced in Muslim Marriages in Malaysia and was founded on the basis of effort and contribution of parties during their marriage. For example in the case of *Ahmad Fikri Bin Mahmud v. Habibah Binti Muhamad* (2007) 23 JH, part 1, 23) where the court refused to consider the disputed asset as *harta sepencarian* and to order the

division of *harta sepencarian* to the plaintiff as the absence of contribution of the plaintiff in acquisition of the assets. Thus, the contribution to the acquisition of asset acts as a significant proof of the existence of joint and sole effort of parties which made possible the rights for entitlement to the share of assets. This certainly clarifies that the existence of marriage and living together as husband and wife does not by itself constitute matrimonial assets and therefore, liable to be divided after divorce. (Suwaid Tapah, 2001, 126)

By virtue of this provision, the law of division is more extensive and clear when the law differentiating the assets into joint and sole effort. By including the homemaker's contribution in household job as a factor to determine the share of sole effort enables the homemaker to get her share out of the assets which she has not acquired. This indicates that the law gives recognition to the homemaker's role in taking care of the family. The law also guided the court in determining the proportion of share by providing the specific quantum of  $\frac{1}{2}$ ,  $\frac{1}{3}$  or greater proportion thus, implying that the law is not too rigid. The court, however, has discretion in allocating the correct proportion of share either  $\frac{1}{2}$ ,  $\frac{1}{3}$  or  $\frac{1}{6}$  according to the circumstances of a case. However, the courts are very much inclined to the contribution in the acquisition of asset as sole criteria in determining the proportion.

### **3. SULH AS AN AMICABLE SETTLEMENT IN DIVISION OF MATRIMONIAL ASSET**

In division of matrimonial property the element of generosity and kindness appears when the parties allows to forgo each party's rights to whole or substantial parts of the asset in determining the proportion of share either through the execution of gift or mutual agreement or *sulh* of parties. In the Malaysian Syariah Court, *sulh* methods has been implemented since 2002 when the court gives primary attention to dispute settlement instrument through conciliation. (Siti Noraini Bt Hj Mohd Ali, (2008), 1). The concept of dispute settlement outside the court through *sulh* is an essential methods used in dispute settlement involving family matters. *Sulh* is described as the result or finding from a conciliation or mutual consent of disputed parties achieved through the mediation process (Siti Noraini Bt Hj Mohd Ali, (2008), 1). *Sulh* is defined in *Majallah al Ahkam al Adliyyah* as an agreement which ended the dispute voluntarily and mutually pleased with each other and it is executed depending on the claim and application enunciated by the disputed parties.

*Sulh* or spousal agreement are amicable settlement that commonly used in dividing the matrimonial property out of the normal litigation proceeding. The parties to any proceedings, at any stage hold *sulh* to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with *Hukum Syarak* (Section 99 of Selangor Syariah Court Civil Procedure (2003).

In the agreement, the data highlighted that each parties agreed to accept proportion, waive each parties rights and in some occasion the parties agreed to transfer whole interest of the property to the other spouse and both parties husband and wife in some instances allows the asset to be considered as their gift to their children. However, there was no literature available on the matter of the effectiveness of the law through the practice of the Syariah Court. Philanthropy is defined as altruistic concern for human welfare and advancement, usually manifested by donations of money, property, or work to needy persons, by endowment of institutions of learning and hospitals, and by generosity to other socially useful purposes. It also identified as an activity of donating to such persons or purposes in this way: to devote one's later years to philanthropy. (thesaurus, 2015). In division of matrimonial property the element of generosity appears when the parties allows to forgo each party's rights to whole or substantial parts of the asset in determining the proportion of share either through the execution of gift or mutual agreement of parties.

Observation on some cases signifies that *sulh* is a preferred method for settlement in the division of matrimonial property and it is used in settlement of matrimonial property dispute in other ancillary matters such as *mut'ah* (*Abd Ghani Abdullah v. Norhanita Abd Hamid*; 10200-017-19-

2001 (Selangor).], arrears of maintenance and maintenance. In the case of *Abd Ghani Abdullah v. Norhanita Abd Hamid* (10200-017-19-2001 (Selangor) where resolution for *harta sepencarian* and *mut'ah* when the court declared that two units of houses and a furnished matrimonial home valued at RM150 000 situated at Kajang, Selangor to be transferred to the defendant. At divorce, the court established that there was an agreement concluded related to matrimonial property and *mut'ah*, however the agreement could not be recorded due to the asset valued was exceeded RM 100,000. The cases showed that the court was in favor to invoke *sulh* as an amicable settlement to guarantee fair division of *harta sepencarian* to both parties. In *sulh* (*Sulh Work Manual Jabatan Kehakiman Syariah Malaysia* and Circular of Chief Judge MSS 1/2002 (Code of Ethics of *Sulh* Officer and *Sulh Work Manual, Pekeliling Ketua Hakim MSS 9/2002* (The power of *sulh* officer); *Jabatan Kehakiman Syariah Malaysia Practice Direction 3/2002 (pemakaian sulh)*; Nora Abdul Hak, 2007, 94) the meeting involved the parties and a *sulh* officer where it should be held within 21 days after registration of case. The agreement is effective after be endorsed and enforced by the court. Failure to reach for the agreement leads the case to be litigated in normal proceeding.

#### 4. METHODOLOGY OF STUDY

Using data from 38 unreported cases, the case law analysis seeks to examine the methods used and the effectiveness of the law through examining the approach and practice of the court. The data represent the *sulh* as method appropriate to settle the dispute in division of matrimonial asset after death of spouse. Besides, using provision related to law of division in sec. 122 of Islamic Family law Enactments, this statutory analysis to examine the law and other legal provisions governing the principles, application and interpretation of law in the division of matrimonial asset.

The statutory analysis examines significant development of the codified law and significant improvement in the existing law as well as strengths and weaknesses for further improvement of the law. Case law analysis was also conducted to depict the extension of the law for improvement of statutory provision. Identifying problems in applying the existing law is the focus in this research; therefore, the reference is made to reported cases in various law journals. This discussion is mainly confined to the factors and variables that the court commonly applies when determining the share. Therefore, content analysis on the judicial decision of reported cases focus on the practical approaches of the court in putting the law into practice for the purpose of identifying area of law which are considered impractical and unclear.

The main focus of this research was on several variables including element of contribution, proportion determination and type of matrimonial assets. On that note, the study also adopts field work research by exploiting case studies of unreported cases which are carefully selected from six Shariah Courts to represent all the states in Malaysia. The states are Selangor which has a high density of population representing the Western Region, Penang also with higher population representing the northern region. Johor is representing the Southern Region, Kelantan representing the population of the Eastern Region and lastly, Sarawak representing the population of East Malaysia. Cases from Perak are included since Perak has a similar law however the proportion of assets is equal.

Data were analyzed using content analysis where observation on the court assessment on factors and several variable to determine the division of matrimonial assets. The variables are the scope of matrimonial assets, the factors of consideration which include monetary and non-monetary contributions and the proportion of division of matrimonial asset. The observation on data highlighted that in practice the division of *harta sepencarian* upon death was made via *sulh* where the parties agreed on what assets to be considered as *harta sepencarian* and proportion of division entitled to both parties. In order to explain the divisional practices upon death, elaboration and commentary of some unreported cases to be relied upon as to see the court's approach in



dividing asset as well as factors used to determine the division and whether any expansion on the law has been done.

## **5. RESULT**

Discussion on the analysis of the data regarding the division of the asset through application of *sulh* as follows:

### **5.1 Division upon Death in *Sulh* Proceeding**

The study explains that the litigation process of the claim in the division of assets upon death is shortened by spousal agreement during the lifetime of the parties. Proving the extent of contribution and involvement of many parties cause the delay which prolong the process in the court. The party involved in the claim for division of matrimonial property after the death of spouse is varies from one case to another. For examples the litigation could be between children and wives of deceased, children of deceased and siblings of the deceased. Others like the defendant were the deceased's sibling when the deceased left no children and also involves parents of the deceased, involving children and wives of the deceased (*Aminah Binti Abdullah v. Noriah Bt Ahmad, Zulkifli Bin Daud and 19 others* 03100-017-0011-2003 (Kelantan), the defendants consist of the deceased's second wife and the deceased's children from his first, second wife and other divorced wife (03100-017-11-2003 (Kelantan), cases where the parties involved were the children of deceased and sibling of the deceased (*Mek Yam Binti Mat Jusoh v. Mat Dohim Bin Seman and Mek Embong Bin Seman* 03100-017-0070-2003 (Kelantan). In other word the parties other than the spouse of deceased are heirs of the deceased when the property of the deceased which previously matrimonial property are subjected to be distributed according to the rule of inheritance.

Via *sulh*, it appears to be a practical method and a form of amicable settlement for the division of matrimonial assets of a deceased's estate. Thus, mutual agreement on proportion of share promoting a peaceful solution between the deceased's spouse and heirs after both parties have been granted with an agreed proportion as regards to matrimonial and inheritance property. Besides, *sulh* was effective to resolve the issue of proving cases especially on elements of contribution which were hardly to be conducted after death in a litigation process.

In the Kelantan case of *Aminah Binti Abdullah v. Noriah Bt Ahmad, Zulkifli Bin Daud and 19 others* (03100-017-11-2003 (Kelantan). the court held that upon parties' agreement, a land lot situated at Bachok be declared as *harta sepencarian* where half share of the land was granted to the plaintiff while the other half was to be divided among the defendants according to the law of inheritance. The plaintiff claimed an equal share due to her direct and indirect contributions. Her contribution to the acquisition of the estate was made by assisting the deceased husband in a food business where she claimed that from the deceased's savings out of the business, he managed to acquire some assets.

The terms of settlement are also considered in determining equal shares to both the deceased's wives. This was illustrated in the Perak case of *Che Su Binti Hj Md Yusoff v. Fauziah Binti Mad Isa and anor* (08100-017-0165-2010 (Perak) where the court held that based on an agreement by the parties, movable assets consisting of saving monies in several accounts and shares valued at RM463 000 and half share of land registered in the deceased name be pooled under the estate of the deceased. An agreement was achieved on Amanah Saham Bumiputra valued at RM328 000 where RM 100 000 to the deceased's second wife who was the step mother and the defendant's mother, RM100 000 to the administrator of the deceased's first wife who died before the deceased's death. The balance has been divided according to *faraid* to the deceased's heirs. However, half of land and monies amounting to RM 135 000 were divided according to *faraid*. Transfer of the whole asset comprised of three lots of land situated at Alor Gajah and one



fourth of Amanah Saham Nasional amounting to RM89 000. These were given to the plaintiff as ordered by the court (*Timah Bt Dalip v. Abdul Malek B Md Aris and another* 01100-017-0162-2007 (Johor). As regards to lots of land in Felda land Settlement where the acquisition was made through the joint effort of the husband and wife, as agreed half portion was ordered by the court to be granted to the wife (*Asmah Bt Ali v. Siti Mariam Bt Ismail and anor* 01100-017-0271-2005 (Johor).

It was also observed that in several cases 1/3 proportion of matrimonial assets was allocated to the wife before execution of *faraid* to deceased's heir. This was illustrated in Selangor in the case of *Yuslinda, Liza Suriani & Abd Rashid B. Mohamad v. Norsidah Dakin* (10200-017-04-2001 (Selangor) where the plaintiff, heir of deceased's husband claimed all asset consisting of immovable property such as a house situated at Klang, three land lots at Mukim Kapar, Selangor and a land lot at Telok, Selangor be regarded as deceased's estate. The claim also included movable property consisting of savings account amounting to RM 30 000 and EPF amounting to RM 2000. However, the defendant, the deceased's wife disagreed with the claim and asked for the assets to be regarded as matrimonial property on the grounds that the asset were acquired during their marriage and the defendant-wife had made the financial contributions in the acquisition of the assets. The court held that the plaintiff and the defendant had agreed that the estate be distributed among the heirs. However, prior to the distribution the court ordered 1/3 of share of matrimonial property to be awarded to the defendant.

It was observed that in a majority of cases the matrimonial assets were commonly fixed to ½ and 1/3 share. For example, in the Perak case of *Faridah Binti Abdul Wahid v. Nor Azura Bt Zawani & anor* (08100-017-0076-2009 (Perak).the court held that a house and a land situated at Perak be declared as *harta sepencarian* and ½ share be given to the plaintiff, deceased wife and the other half was to be distributed among the heirs according to *faraid*. As regards a car, which was registered under the sole name of the plaintiff, the court ordered that the car be transferred to the plaintiff and in exchange the plaintiff was ordered to pay RM5000 to be divided among the heirs. However, ASB amounting to RM8 000 was to be given to the plaintiff. In another Perak case, in the case of *Saayah Binti Hassan v. Non Bt. Ali* (08700-017-0006-2008 (Perak), the plaintiff was the ex-wife of the deceased husband who died in 2006. They were married in 1955 and later divorced in 1969. The defendant was the second wife of the deceased husband. The plaintiff claimed that during their marriage they had acquired two land lots situated at Matang, Perak and requested that these assets be declared as matrimonial property. The court allowed the plaintiff's claim and by agreement of parties ordered that the lands be divided 1/6 to the plaintiff, 1/6 to the defendant and 1/6 to each of four other defendant's sons and daughter with the deceased husband. Thus the discussion highlights that *sulh* is an amicable settlement in the division of asset upon death of spouse.

## **5.2 Matrimonial Home**

Matrimonial home is among most frequent asset been divided upon death of spouse. The Division of matrimonial home may vary in proportion and be subjected to the parties' mutual agreement. However, the case is treated differently in the absence of the spouse due to death. The transfer of the matrimonial home to a deceased spouse was illustrated in Perak case of *Amienadzariza Jamali v. Abu Bakar Mohd Yusof* (10200-017-0315-2005 (Selangor). The court ordered by agreement of the defendants, to transfer a double-storey terrace house situated at Shah Alam to the plaintiff. The court also ordered to omit the sole name of the deceased in the title. The plaintiff also agreed to bear the bank's mortgage instalments and expenses of the house. In another case, the division in equal share of matrimonial home to deceased wife was also ordered by the court. This was illustrated in the case of *Syarikin Bt Ab.Rahman v. Awang B Redan & 4 anor* (1220-17-17-2000 (Johor) where the court ordered a matrimonial home situated at Shah

Alam owned by the deceased husband to be divided in equal share to the plaintiff and among the heirs of the deceased.

However, the determination of shares out of net proceeds of sale of a matrimonial home was also considered as part of the division. This was illustrated in the Selangor case of *Mariam Abu Bakar/ Ibrahim Abu Bakar v. Dato' Zorkarnain B. Abd. Rahman* (10200-017-38-2003 (Perak) where the court based on the agreement of both parties ordered that the defendant be entitled to 2/3 share out of net value of the matrimonial assets consists of a house, a land and three units of apartments amounting to RM810 000. Therefore, RM220 000 earned by the deceased after deducting RM50 000 received as the proceeds of sales of the apartments was the share of the deceased which was subject to *faraid* rule. The court ordered the value paid in cash to be distributed as *faraid* to legal heirs of the deceased.

It is observed that greater share is allocated to a deceased's spouse after the court takes into account the debt of the assets. This was explained in Perak case of *Md Isa Jamaluddin B. Jamaluddin v. Abd Wahab B. Awang & Anor* (10200-017-179-2005 (Perak) where the court held that the plaintiff was entitled to 70% of the current value after deducting the Cheras house loan balances and the balance 30% was to be distributed among heirs. However, 90% value of a house situated at Pasir Gudang, Johor Bahru after deducting the loan balance was to be given to the plaintiff and the rest 10% of the share was to be distributed among the heirs. The defendants agreed to award greater share to the plaintiff due to his immense liability and greater contribution for the instalment of both houses.

Upon the death of a spouse, matrimonial home which is originally *harta sepencarian* is subject to division under *faraid* rule. Nevertheless, sharing of the matrimonial home with the deceased children might cause inconvenience to the wife. At the same time, acquiring new property cause hardship especially to non-working wife due to the increased price of the property. In this regards, joint tenancy of matrimonial home is a practical solution to overcome the issue.

### **5.3 Consideration on Usage of Asset:**

The division also took into consideration the continuation of usage of assets by the deceased's family. This was explained in the Perak case of *Faridah Binti Abdul Wahid v. Nor Azura Bt Zawani & anor* (08100-017-0076-2009 (Perak) where the court ordered the interest of a car to be transferred to the plaintiff, the defendants' mother. This shows that the division may not be necessarily in the form of determining a specific share. For a just and fair division, the transfer of vehicle took place after taking into account the need of the parties to use the asset as a means of transportation even after the death of the deceased spouse.

### **5.4 Deceased Debt**

For settlement of the deceased's debt, in practice the debt would be deducted specifically from the share of the heirs after the division of matrimonial property had been made. It was illustrated in the Perak case of *Che Zawiyah Bt Che Din v. Zakiah Binti Che Din* (08100-017-85-2001(Perak) where the court held that the deceased's portion of 50% out of total value of matrimonial asset which amounted to RM250 000 be distributed to the deceased's heirs after deducting all debts incurred by the deceased and the net value of the asset would be distributed according to *faraid*.

### **5.5 Movable Asset**

Movable assets like shares, business assets and saving monies were included for division of matrimonial property. (*Su Binti Hj Md Yusoff v. Fauziah Binti Mad Isa and anor* 08100-017-01165-

2010 (Perak). This was illustrated in Perak case of *Che Zawiyah Bt Che Din v. Zakiah Binti Che Din*(08100-017-85-2001(Perak) where in 65 years of marriage, the court ordered that movable assets consisting of ASB shares and savings accounts of the deceased husband amounting to RM 235.000 be declared as *harta sepencarian* and the amount was ordered to be divided equally between the plaintiff and the deceased husband. However, It was explained in Selangor case of *Absah Saidin v. Mohd Omar Mokhtar B. Sabri*(10200-017-0142-2008 (Selangor) where the assets of Term Loan (ASB) RM62000, saving and insurance in Bank Rakyat amounting to RM9350, ASB savings amounting to RM16900, EPF amounting to RM5000 were decided as *faraid* to be divided among the deceased's heirs. Besides, assets in term of death and accident insurance payment benefit amounting to RM50400, EPF amounting to RM58 000, a salary balance of RM27 522.08 were included in the division of matrimonial assets.

### **5.6 Employee Provident Fund**

As regards the Employee Provident Fund (EPF), the court approved the asset as matrimonial property upon the parties consent. This is a significant development in the Syariah court as the general law excludes EPF as matrimonial assets. This was illustrated in the Selangor case of *Amienadzariza Jamali v. Abu Bakar Mohd Yusof*(10200-017-0315-2005 (Selangor) where the court ordered RM100 000 to be awarded to the defendant, deceased's parents as a settlement against insurance money, EPF and emolument of the deceased as consented by the plaintiff. In contrast, the defendant agreed that the balance of insurance, emolument and EPF monies to be awarded to the plaintiff and the two children. Similarly, in Johor case of *Syarikin Bt. Ab. Rahman v. Awang B.Redan & anor*(1220-017-17-2000(Johor) explained that the court ordered EPF monies solely funded by the deceased husband valued at RM66357.59 to be regarded as *harta sepencarian* and the court awarded the plaintiff half of the share of the fund. A similar rule was applied in Selangor case of *Yuslinda, Liza Suriani & Abd.Rashid B. Mohamad v. Norsidah Dakin* (10200-017-04-2001(Selangor) where the court ordered 1/3 share of EPF monies amounting to RM2000 to be awarded to the defendant. Thus, from the study it was noted that the court may declare the saving in EPF as matrimonial property and divided the asset between the deceased spouse based on *sulh* and agreement of parties.

### **5.7 Factor taken into consideration**

The study also observed that the agreed proportion is determined based on the extent of the parties' contribution either direct or indirect. This was illustrated in the case of *Mariam Abu Bakar/ Ibrahim Abu Bakar v. Dato' Zorkarnain B. Abd. Rahman*(10200-017-38-03 (Selangor) where the court ordered to the plaintiff 1/3 of share as her entitlement in taking care of the well being of the family. In this case a greater share was awarded to the defendant who had made greater contributions. This shows that the agreed proportion determined through *sulh* may be based upon the extent of the contribution of parties made in the acquisition of assets.

Thus, the above discussion signifies that in the division of matrimonial assets upon death, resolution by agreement of parties is substantial and significant to determine the division of matrimonial assets. The parties may agree to the division either on the basis of the parties' extent of direct or indirect contribution or mainly based on the welfare of parties or the children's interest. Pertaining to proportion of share of matrimonial property, it has been observed that by procedure of *sulh*, the parties may transfer a greater portion, despite the fixed rule of 1/3 or 1/2 shares. In other words, the parties have a wider discretion to determine the proportion based on the factors of the needs of the deceased spouse, contribution and others. As regards to matrimonial assets included in the division, the study highlighted that the court has expanded the types of matrimonial assets to include tangible and intangible assets owned by the deceased spouse.

## **6. CONCLUSION**

The spousal agreement despite shorten the litigation process, it is a mutual agreement which does not require the contribution of the parties to be established in ascertaining the proportion of the matrimonial asset. This mode has been accepted in the practice of division of matrimonial assets upon the death of spouse. It has been observed that in the Malaysian Syariah Court, *sulh* is a potential mode of an amicable settlement which is a strong mechanism to be used in the division of the matrimonial assets. This due to the difficulty faced by the Syariah Court in determining the proportion by using the current mode of assessment that focus more on the contribution of parties to quantify the proportions. Beside, by the nature of *sulh*, the proportion based on the spousal agreement promotes fair division among the parties and the fact that it could shorten the process of application to *harta sepencarian*. The parties are generous as to allow exclusive ownership of matrimonial asset especially matrimonial home to the deceased's wife that could provide adequate security and protection for her survival after the death of husband. Due to this, it is suggested that the use of *sulh* as a mode of dividing the matrimonial asset be extended widely to the division upon the death of a spouse. Thus, in connection to this, there is a need for a proper mechanism to uphold the process of *sulh* such as to facilitate the process with a proper checklist. This will ease the burden of the Syariah Court officers and equip them with proper knowledge related to the *sulh* process and the execution of *sulh*.

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